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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. _____

CHARLIE M. WEBSTER
Petitioner

versus

OFFSHORE FOOD SERVICE, INC., ET AL
Respondents

PETITION FOR WRIT OF CERTIORARI TO REVIEW JUDGMENT OF THE FIFTH CIRCUIT COURT OF APPEALS IN NUMBER 30188 OF THE DOCKET OF SAID COURT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Petitioner, Charlie M. Webster, prays that a writ of certiorari issue herein to the United States Court of Appeals for the Fifth Circuit to review the opinion and judgment of said Court rendered on November 20, 1970, as to which rehearing was refused on December 15, 1970, in the matter entitled "Charlie M. Webster versus Offshore Food

Service, Inc., et al" of the said Court.

CITATIONS TO THE OPINIONS BELOW

The opinion of the Judge of the United States District Court, Eastern District of Louisiana, Section B, printed in Appendix C hereto, was unreported. The opinion of the United States Court of Appeals, Fifth Circuit, printed in Appendix B hereto, is reported at _____ F. 2d _____. The order of the United States Court of Appeals, Fifth Circuit, denying the application for rehearing printed in Appendix A hereto, was not reported.

JURISDICTIONAL STATEMENT

The opinion of the Fifth Circuit Court of Appeals was rendered on November 20, 1970 and rehearing was denied on December 15, 1970.

Judisdiction of this Court is invoked under 28 U.S.C. 1254(1).

The judgment complained of is a final judgment

QUESTIONS PRESENTED

(1) Whether a doctor's medical expert opinion meets the test of representing the "absence of any material fact" necessary to justify dismissal via summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure?

(2) Whether a doctor's medical expert opinion can represent an "unequivocal fact" that a jury cannot disregard?

(3) Whether inferences to be drawn from a medical expert opinion are such that a jury must follow exact same path of inferences of the judge who would try the case?

STATUTES INVOLVED

Rule 56 of the Federal Rules of Civil Procedure.

Jones Act (46 USC 688).

Rule 38 of the Federal Rules of Civil Procedure.

Seventh Amendment to the U. S. Constitution.

STATEMENT OF THE CASE

Although petitioner does not accept the facts as stated by the court below as being entirely accurate, the following quotation from the opinion below may be taken as a bold outline of the factual background in this case. Thus, on page 2 of its opinion herein the Fifth Circuit declared:

> "Appellant was employed by Offshore Food Service Company aboard a submersible drilling rig between January 17 and early August of 1968, working seven days on and seven off. Shortly before commencing this employment he had taken a physical examination which disclosed no evidence of active

tuberculosis. In mid-August 1968 he was hospitalized, and in mid-October after extensive testing, he was diagnosed as having pulmonary tuberculosis. In late October he sued Offshore, as well as the rig and its owner, claiming all were negligent and the vessel unseaworthy. In the course of discovery, the allegations of negligence and unseaworthiness were narrowed to the claim that Arthur Winn, appellant's roommate aboard the rig, persistently spat sputum into an open can in their room.

Offshore moved for summary judgment on the basis of an affidavit and medical report of Dr. Ziskind, who had examined Winn in May 1969. This motion was joined by the other defendants. Originally scheduled for hearing in late November 1969, the motion was continued until January 1970, and thereafter was held open to allow plaintiff to take Dr. Ziskind's deposition. At the deposition, taken in February 1970, as in his original affidavit, Dr. Ziskind testified to three vital points. He stated that when he examined Winn he found no evidence of active pulmonary tuberculosis. He stated his opinion that if Winn had active pulmonary tuberculosis in February

1968, he would have had it in May 1969, for without treatment the disease was progressive and 50 percent fatal within five years, and spontaneous cure was highly unlikely. Finally, he asserted that Winn could have transmitted the disease to appellant only if Winn himself had an active and open case. His conclusion was that appellant could not have contracted the disease from Winn.

The deposition was filed with the District Court and included in the papers supporting the motion for summary judgment. Appellant offered no counter affidavits of medical experts tending to show that a person without active tuberculosis might transmit the disease to another person, or that an active case might spontaneously cure itself, and he did not depose Winn as to his past medical history. In short, appellant made no showing that he had contracted the disease from Winn apart from the facts that appellant had no tuberculosis in 1967, that he had it in August 1968, and that in the interim he had roomed with Winn, who spat into an open can.

In May the District Court granted summary judgment for defendants. Appellant recognizes that the testimony of Dr. Ziskind is a statement of opinion which would be admissible

at trial, but he urges that no opinion testimony is sufficiently probative to form the basis for rendition of summary judgment. We disagree and affirm."

In a motion for a summary judgment the District Court below adopted rules of law as announced by Samanski v. Mobile Seafood Company, Inc., 258 F. 2d 823 (5th Circuit, 1958), as urged by the appellees and ignored by the opinion of the United States Supreme Court as announced in Sentilles v. Inter-Caribbean Corp., 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 (1959). Likewise, the Fifth Circuit opinion represents another concentrated effort to avoid the impact of Sentilles v. Inter-Caribbean Corp., supra.

ARGUMENT

In granting the original motion for a summary judgment the U. S. District Court below assumed that the medical opinion of Dr. Martin Ziskind was a "material fact" and applied the rule of law as announced in Samanski v. Mobile Seafood Company, Inc., 258 F. 2d 823 (5th Circuit, 1958.) This was a false rule of law. It denied the plaintiff a right of a trial by jury as guaranteed by the Seventh Amendment to the United States Constitution, the Jones Act itself, 46 USC 688 and Rule 38 (a) of the Federal Rules of Civil Procedure. This judgment of the District Court below ignored the holding of Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173 (1959):

"The jury's power to draw the inference that the aggravation of petitioner's tubercular condition, ... was in fact caused by that accident, was not impaired by the failure of any medical witness to testify that it was in fact the cause. (Emphasis ours.) The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation (2). They were entitled to take all the circumstances, including the medical testimony into consideration. See Sullivan v. Boston Elevated R. Co., 185 Mass. 602, 71 N.E. 90; Miami Coal Co. v. Luce, 76 Inc. App. 245, 131 N.E. 824 (3)." (Emphasis ours.)

And it is this second part of the Sentilles holding that was avoided by the District Court and the Fifth Circuit, for if the jury were allowed to "take all the circumstances," including the medical opinion of Dr. Ziskind, then the jury may give weight to the following:

(a) The mustering out negative X-ray of Charlie Webster on March 1, 1967, after twenty years of service in the U. S. Army;

(b) The pre-employment physical examination of Charlie Webster by the defendant/appellee doctor, Dr. W. A. Marmande on December 27, 1967,

nineteen days before he commenced working aboard the vessel, MARLIN 3, which was negative;

(c) That it took a multiplicity of tests from July 1, 1968 to October 15, 1968, including two months in-patient stay at the U.S. Public Health Hospital before the USPHS would opine the diagnosis that Charlie Webster had tuberculosis;

(d) That this progressive investigation of Charlie Webster which took more than three months to reach as a diagnosis of tuberculosis should be compared with the dogmatic, positive opinion concerning Arthur Winn, pertaining to a one visit examination.

Obviously, if a jury were allowed to consider "all the circumstances" then the jury, itself, as opposed to judges, may determine that a fact is a fact, that a fact is not an opinion and that the opinion of Dr. Ziskind is not a fact.

Samanski v. Mobile Seafood Co., Inc., 258 F. 2d 823 (5th Cir. 1958) and Inter-Caribbean Shipping Corp. v. Sentilles (5th Cir. 1958) 256 F. 2d 156, are both prior holdings of the Fifth Circuit Court of Appeals and it is Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, which is a reversal of the Fifth Circuit by the U. S. Supreme Court. The opinion of the instant case of

Charlie Webster represents a retreat of the same Fifth Circuit back to Samanski, supra.

Observe the Charlie Webster appellate opinion:

> "For disposition by summary judgment to be appropriate the moving party must present 'evidence which a jury would not be at liberty to disbelieve'... Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 624, 88 L. Ed. 967, 971 (1944). It follows that...the grant of a motion for a summary judgment is often inappropriate where the evidence bearing on crucial issues of fact is in the form of expert opinion testimony. E.g. Sartor v. Arkansas Nat. Gas Corp., supra, at 627-8, 88 L. Ed. at 972-3 (summary judgment); Head v. Hargrave, 105 U.S. 45, 49-50, 26 L. Ed. 1028, 1030 (1882) (directed verdict). Of the reasons for this rule, two are significant here. Both proceed from the proposition that once 'the court admits (expert) testimony, then it is for the jury to decide whether any, and if any, what, weight is to be given to the testimony.' Sartor, supra at 627, 88 L. Ed. at 973. (Emphasis ours.)
>
> First, the trier of fact is entitled to weigh the credibility of the witness and to value his testimony in light of his demeanor on the stand. Sartor,

supra, at 627-8, 88 L. Ed. at 973; see Loudermilk vs. Fidelity & Casualty Co. of New York, 199 F. 2d 561, 565-66 (5th Circuit 1952); Whitaker v. Coleman, 115 F. 2d 305, 307 (5th Cir. 1940). Second, and perhaps more important, is the general recognition that the trier of fact is not bound by expert testimony and may substitute its own common-sense judgment for that of the experts. Sartor, supra, at 627-8, 88 L. Ed. at 973; Head v. Hargrave, supra; see New York Life Ins. Co. vs. Johnston, 256 F. 2d 115, 119 (5th Cir. 1958)."

Considering the foregoing quote from the Fifth Circuit opinion, it is difficult to logically explain how the Fifth Circuit Court did not automatically apply the holding of Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107 and reverse the lower court. However, in rendering its opinion, the Fifth Circuit reverted to its own prior opinions in Samanski, supra and Inter-Caribbean Shipping Corp. v. Sentilles, 256 F. 2d 156.

Observe the switch of the Fifth Circuit opinion:

"Neither rationale precludes summary judgment in this case. We do not clearly understand appellant to contend in this court that Dr. Ziskind's credibility is an issue. Even if he did, the contention would be unavailing.

> The District Court did not reject the testimony as simply unpersuasive, and appellant offered no evidence in opposition to the motion tending to undermine Dr. Ziskind's qualifications or credibility... Cross examination failed to impair the doctor's testimony."

Thus suddenly, the holding of Sentilles, supra, Sartor, supra, and Head vs. Hargrave, supra, are abandoned. Dr. Ziskind assumes the role of a deity and his credibility is fixed beyond challenge. The District Court did not reject the testimony as simply unpersuasive; therefore the jury is precluded from doing otherwise. It all may be contrary to Sentilles, Sartor and Head, supra, but to the Fifth Circuit, this is a special case, deserving of special rules of law.

Observe more semantics:

> "Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, is not to the contrary... Sentilles does not reach the question whether the trier of fact may find that a particular phenomenon was the source of plaintiff's disease in the face of 'unequivocal and uncontradicted testimony to the contrary,' given by an expert witness whose qualifications have not been impeached."

Of course, this is false. Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, is to the contrary. At 361 U.S. 109, there is this passage:

"The matter does not turn on the use of a particular form of words by the physicians in giving their testimony. The members of the jury, not the medical witnesses, were sworn to make a legal determination of the question of causation. (Emphasis ours.) They were entitled to take all of the circumstances, including the medical testimony, into consideration. See Sullivan v. Boston Elevated R. Co., 185 Mass. 602, 71 N.E. 90; Miami Coal Co. v. Luce, 76 Ind. App. 245, 131 N.E. 824. Though this case involves a medical issue, it is no exception to the admonition that, 'It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusions... Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.' Tenant v. Peoria & Pekin Union R. Co., 321 U.S. 29, 35."

The opinion concerning Charlie Webster, the Fifth Circuit Court of Appeals explains:

"...nor does our holding involve the propriety of summary judgment on the basis of expert testimony in general. We are not confronted with expert testimony which is equivocal or internally inconsistent or which bears on issues as to which, by their nature, the trier of fact would be entitled to substitute its own practical judgment for the opinion of experts, even though the expert testimony be uncontradicted."

Thus, the Sentilles holding of the U. S. Supreme Court applies only to expert testimony "in general" and this case of Charlie Webster is a particular and exceptional case where the right to a trial by jury must be barred and prohibited. And this deprivation of the right of a trial by jury is further excused by the Fifth Circuit:

"...We hold only that, in the absence of opposing evidence the unequivocal testimony offered in support of the motion in this case supported the District Court conclusion that there was no genuine issue of material fact to be resolved..."

Thus, for some unexplained reason the opinion testimony concerning the condition of Arthur Winn's sputum sixteen months before examination is converted into "an absolute fact" for which the jury in this particular and exceptional case, loses all rights to draw its own inferences.

Dr. Ziskind was of the opinion that the sputum of Arthur Winn some sixteen months prior to examination by Dr. Ziskind did not cause the tubercular condition of Charlie Webster, but his opinion was not as dogmatic and absolute as inferred by the Fifth Circuit. Page 22 of Dr. Ziskind's deposition reveals:

"Q If Charlie Webster had a latent infection... exposed to a roommate... constantly expectorating, could this aggravate latent dormant condition?

A There is a lot of evidence that it wouldn't.

Q Is there any evidence it would?

A Nothing that's published. I reviewed a little article in which somebody tried to show that point, that the experience with a previous infection didn't protect against re-infection, but it was a very difficult thing to show and I don't think it was really proven...

Q If Charlie Webster had a latent condition and his lungs were exposed to bronchial infection because of expectoration of his roommate, couldn't that bring about the latent condition within himself to flare up?

Continued on Page 23 of the deposition

A That could be another thing. If somebody who had latent tuberculosis developed an infection which wasn't tuberculosis which damaged the structure of the lungs, that could free, of course, open up old tuberculosis and aggravate disease. That's been shown... but there are other viruses in which there is a damage to the bronchi and watering of the infection through the walls of the lung which have occasionally developed in the opening up of tuberculous areas of disease but you have got to show that."

Then going over to Page 25, the testimony of Dr. Ziskind continued:

"Q When you examined Mr. Winn, would your examination rule out any type of infection in his lungs for a fifteen month or an eighteen month period?

A Oh, no. I just examined Mr. Winn on that day and with regard to what happened to him before that. All I can say is what he told me in the office, just history which I obtained.

And the only question then is whether this is a full account..."
(Emphasis ours.)

And still continuing further on Page 27 of the deposition, the testimony of Dr. Ziskind continued:

"Q ...If Charlie Webster was a man who on this vessel had a dormant case of tuberculosis, ...and if he got into a room... this roommate had infected lungs, ...cold, flu, virus or bronchitis, and he expectorated in an open bucket, wouldn't that make Charlie Webster susceptible to cold and flu and virus?

A ...If he had an infection which could be transmitted to someone else, then surely he could transmit that infection and then, whether a superficial infection or that sort of thing--it would probably not have any effect on Webster. It would only be if it were communicated to such a degree that it produced changes within the lungs which opened up the tuberculosis fossae."
(Emphasis ours.)

Since the act of spitting in the open can by Arthur Winn took place sixteen months prior to the examination by Dr. Ziskind "what degree of

communication or changes within the lungs of Charlie Webster" does the Fifth Circuit hold to be unequivocal?

In spite of the foregoing, the Fifth Circuit held that the testimony of the doctor was unequivocal opinion which somehow transformed itself into unequivocal fact, such that in this particular and exceptional case the jury should first be precluded from disregarding any part of the opinion testimony of the doctor and secondly, that the jury had to draw the same inferences from this testimony as the judges.

This is tyranny. It is a return to the Dark Ages and the Middle Ages, when opinions of facts, as announced by certain authorities were the only opinions to be tolerated.

Perhaps to some judges, the opinions of a doctor are absolute and perhaps to some judges a jury should not be allowed to draw different and contrary inference to those of doctors, but since the signing of the Magna Carta that has not been the law of the English-speaking world. Surely, it is not the law or the spirit of the Seventh Amendment to the United States Constitution, Rule 38 or Rule 56 of the Federal Rules of Civil Procedure or the Jones Act (46 USC 688).

CONCLUSION

In conclusion, the petitioner prays for a writ of certiorari urging that the judgment of the District Court, as affirmed by the appellate court, be reversed and that this matter be remanded to the District Court, granting to the petitioner the right to a trial by jury.

Respectfully submitted,

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BY: _____
CHARLES R. MALONEY

PROOF OF SERVICE

I, Charles R. Maloney, an attorney for the petitioner, and a member of the Bar of the Supreme Court of the United States, hereby certify that on this day, I served copies of the foregoing Petition For Writ of Certiorari on Mr. George Baus, counsel for respondent by mailing a copy thereof, postage prepaid, addressed to his office of 847 National Bank of Commerce Building, New Orleans, Louisiana 70112.

Dated this _____ day of _____, 1971.

_____
CHARLES R. MALONEY

Minute Entry
May 8, 1970
Heebe, J.

CHARLIE M. WEBSTER CIVIL ACTION

versus NO. 68-1972

OFFSHORE FOOD SERVICE, INC., et al. SECTION B

This cause came on for hearing on a previous day on the motion of the defendants, Offshore Food Services, Inc., Marlin Drilling Company and the vessel Marlin Drilling Rig No. 3, for summary judgment. After hearing oral argument on January 14, 1970, the matter was held open for the filing of the deposition of Morton M. Ziskind, M.D. The Court received the transcript of Dr. Ziskind's deposition on May 1, 1970. For the reasons assigned below,

IT IS THE ORDER OF THE COURT that the motion of the defendants, Offshore Food Services, Inc., Marlin Drilling Company and the vessel Marlin Drilling Rig No. 3, for summary judgment be, and the same is hereby, GRANTED.

REASONS

Plaintiff, Charlie M. Webster, began his employment with the defendant, Offshore Food Services, Inc., on February 16, 1968. He was

employed by Offshore until August 3, 1968, aboard the Marlin Drilling Rig No. 3. Mr. Webster was assigned to a room with Mr. Arthur Winn. The only allegation in the complaint of negligence and/or unseaworthiness is that the plaintiff was assigned to a room with Mr. Winn who used to constantly spit in an open can during the night and leave the can open. The plaintiff claims that he contracted tuberculosis during the period of time that he was aboard the Marlin Drilling Rig No. 3 as the roommate of Mr. Winn.

The defendants, in support of their motion for summary judgment, filed an affidavit of Dr. Morton Ziskind. Dr. Ziskind states in his affidavit:

> "That he is a licensed physician practicing in the State of Louisiana, specializing in medicine in the field of pulmonary diseases; that attached to this affidavit is his report that he submitted to Aetna Casualty & Surety Company following his examination of Mr. Arthur Winn on May 2, 1969, an analysis of Mr. Arthur Winn's chest X-ray film, electrocardiogram and pulmonary function studies.
>
> "That, considering the examination and the attached report, and in order to clarify and better understand the nature of tuberculosis, deponent does depose and say that

tuberculosis is a contagious disease. However, a new infection can be contracted only by the passage of tubercle bacilli from one who has an open case of tuberculosis to one who has never been previously affected by such a microbe; that Mr. Arthur Winn was examined on May 2, 1969, by deponent and that deponent found no evidence of active pulmonary tuberculosis. Thus, any roommate, companion, or relative of Mr. Winn, who contracted tuberculosis, cannot attribute the cause of the disease to his physical proximity to Mr. Winn, who shows no signs of active pulmonary tuberculosis." (Emphasis added)

At the time of the hearing plaintiff had produced no countervailing evidence but requested that he be allowed to depose Dr. Ziskind, which request was granted. Plaintiff now contends that the motion should be denied based upon Dr. Ziskind's deposition. We disagree. In his deposition, Dr. Ziskind never changed his position as stated in his affidavit. He still concludes that the plaintiff's tuberculosis was not contracted because of his physical proximity to Mr. Winn, who (on May 2, 1969) showed no signs of active pulmonary tuberculosis. (See Deposition of Morton M. Ziskind, M.D.)

The Court finds that there is no genuine issue as to any material fact in this case, and the movers

are entitled to a judgment as a matter of law.

/s/ Frederick J. R. Heebe

George V. Baus, Esq.

Charles R. Maloney, Esq.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 30188
Summary Calendar*

CHARLIE M. WEBSTER
Plaintiff-Appellant,

versus

OFFSHORE FOOD SERVICE, INC., ET AL,
Defendants-Appellees

Appeal from the United States District Court for the Eastern District of Louisiana

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(November 20, 1970)

Before BELL, AINSWORTH and GODBOLD, Circuit Judges

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*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir., 1970, _____ F. 2d _____, Part 1 (No. 29278, August 14, 1970).

GODBOLD, Circuit Judge: Charlie Webster, plaintiff an action brought pursuant to the Jones Act, appeals from the District Court's order granting summary judgment on behalf of all defendants.

Appellant was employed by Offshore Food Service Company aboard a submersible drilling rig between January 17 and early August of 1968, working seven days on and seven off. Shortly before commencing this employment he had taken a physical examination which disclosed no evidence of active tuberculosis. In mid-August 1968 he was hospitalized, and in mid-October, after extensive testing, he was diagnosed as having pulmonary tuberculosis. In late October he sued Offshore, as well as the rig and its owner, claiming all were negligent and the vessel unseaworthy. In the course of discovery, the allegations of negligence and unseaworthiness were narrowed to the claim that Arthur Winn, appellant's roommate aboard the rig, persistently spat sputum into an open can in their room.

Offshore moved for summary judgment on the basis of an affidavit and medical report of Dr. Ziskind, who had examined Winn in May 1969.[1] This motion was joined by the other defendants.

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[1] The medical report is not contained in the record. However, the affidavit of Dr. Ziskind states that the medical report was attached, and it appears that a copy of it was in the possession of plaintiff's counsel when, at a later time, the deposition of Dr. Ziskind was taken.

Originally scheduled for hearing in late November 1969, the motion was continued until January 1970, and thereafter was held open to allow plaintiff to take Dr. Ziskind's deposition. At the deposition, taken in February 1970, as in his original affidavit, Dr. Ziskind testified to three vital points. He stated that when he examined Winn he found no evidence of active pulmonary tuberculosis. He stated his opinion that if Winn had had active pulmonary tuberculosis in February 1968, he would have had it in May 1969, for without treatment the disease was progressive and 50 per cent fatal within five years, and spontaneous cure was highly unlikely. Finally, he asserted that Winn could have transmitted the disease to appellant only if Winn himself had an active and open case. His conclusion was that appellant could not have contracted the disease from Winn.

The deposition was filed with the District Court and included in the papers supporting the motion for summary judgment. Appellant offered no counter affidavits of medical experts tending to show that a person without active tuberculosis might transmit the disease to another person, or that an active case might spontaneously cure itself, and he did not depose Winn as to his past medical history. In short, appellant made no showing that he had contracted the disease from Winn apart from the facts that appellant had no tuberculosis in 1967, that he had it in August 1968, and that in the interim he had roomed with Winn, who spat into an open can.

In May the District Court granted summary judgment for defendants. Appellant recognizes that the testimony of Dr. Ziskind is a statement of opinion which would be admissible at trial, but he urges that no opinion testimony is sufficiently probative to form the basis for rendition of summary judgment. We disagree and affirm.

For disposition by summary judgment to be appropriate, the moving party must present "evidence which a jury would not be at liberty to disbelieve and which would require a directed verdict" in his favor. Sartor v. Arkansas Nat. Gas Corp., 321 U.S. 620, 624, 88 L.Ed. 967, 971 (1944). It follows that, as is the case with a motion for a directed verdict, the grant of a motion for summary judgment is often inappropriate where the evidence bearing on crucial issues of fact is in the form of expert opinion testimony. E.G., Sartor v. Arkansas Nat. Gas Corp.,[2] supra, at 627-8, 88 L.Ed. at 972-3 (summary judgment); Head v. Hargrave, 105 U.S. 45, 49-50, 26 L.Ed. 1028, 1030 (1882) (directed verdict). Of the reasons for this rule, two are significant here. Both proceed from the proposition that once "the court admits (expert)

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[2] The fact that the expert witnesses in Sartor were interested in the outcome was an additional factor which weighed in the balance there, 321 U.S. at 628, 88 L.Ed. at 973. See also Croley v. Matson Navigation Co., No. 29701, (5th Cir. Nov. 2, 1970)(at p. 10 slip opinion).

testimony, then it is for the jury to decide whether any, and if any what, weight is to be given to the testimony." Sartor, supra, at 627, 88 L. Ed. at 973.

First, the trier of fact is entitled to weigh the credibility of the witness and to value his testimony in light of his demeanor on the stand. Sartor, supra, at 627-8, 88 L. Ed. at 973; see Loudermilk v. Fidelity & Casualty Co. of New York, 199 F. 2d 561, 565-66 (5th Cir. 1952); Whitaker v. Coleman, 115 F. 2d 305, 307 (5th Cir. 1940). Second, and perhaps more important, is the general recognition that the trier of fact is not bound by expert testimony and may substitute its own common-sense judgment for that of the experts. Sartor, supra, at 627-8, 88 L. Ed. at 973; Head v. Hargrave, supra; see New York Life Ins. Co. v. Johnston, 256 F. 2d 115, 119 (5th Cir. 1958).

Neither rationale precludes summary judgment in this case. We do not clearly understand appellant to contend in this court that Dr. Ziskind's credibility is in issue. Even if he did, the contention would be unavailing. The District Court did not reject the testimony as simply unpersuasive, and appellant offered no evidence in opposition to the motion tending to undermine Dr. Ziskind's qualifications or credibility. Our conclusion in this regard is buttressed by the fact that at the request of appellant Dr. Ziskind's testimony was offered by deposition and not by affidavit alone, thereby affording appellant opportunity to cross examine

him at length. Cross examination failed to impair the doctor's testimony. See Radio City Music Hall Corp. v. United States, 135 F. 2d 715, 718 (2d Cir. 1943).

As to the second rationale, the trier of fact would not be at liberty to disregard arbitrarily the unequivocal, uncontradicted and unimpeached testimony of an expert witness, Security-First Nat'l. Bank v. Lutz, 322 F. 2d 348, 355 (9th Cir. 1963), where, as here, the testimony bears on technical questions of medical causation beyond the competence of lay determination. Bearman v. Prudential Ins. Co. of America, 186 F. 2d 662, 665 (10th Cir. 1951). Indeed, such opinion testimony may form the basis for a directed verdict, Bearman, supra.[3] We think it no less true that such testimony may support a motion for summary judgment, and we hold that the testimony offered in support of this motion was adequate.

Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 4 L. Ed. 2d 142 (1959), upon which

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[3] It is true that the court which decided Bearman employed a standard in affirming a directed verdict which may be in doubt after Sentilles v. Inter-Caribbean Shipping Co., 361 U. S. 107, 4 L. Ed. 2d 142 (1959), discussed below. However, all experts in that case were of the opinion that the injury in question had not caused the death of the insured. On its facts, then we think the holding of Bearman survives Sentilles.

appellant heavily relies, is not to the contrary. There it was claimed that a shipboard injury had aggravated plaintiff's previously dormant tubercular condition. Three experts testified with varying degrees of confidence to the possibility that the injury had in fact aggravated the condition, but at minimum each testified that there existed some possibility that the injury had been the cause. A jury verdict for the plaintiff was reversed by the Court of Appeals. The Supreme Court ordered the verdict reinstated, holding that the jury's power to infer that the injury had aggravated the condition was not impaired by the failure of any medical witness to testify with certainty that the injury had caused the aggravation, or by the lack of medical unanimity on the degree of likelihood that it had done so. Sentilles does not reach the question whether the trier of fact may find that a particular phenomenon was the source of plaintiff's disease in the face of unequivocal and uncontradicted testimony to the contrary, given by an expert witness whose qualifications have not been impeached. The only expert testimony in this record, unlike that in Sentilles, is that it was not possible for the phenomenon which appellant claims gave rise to his tuberculosis to have done so, since the claimed causal phenomenon could not have existed. Sentilles does not, therefore, preclude summary judgment in this case.

We are not concerned with whether summary judgment would be improper on the basis of testimony such as supports this motion if the opposing party presented contrary opinion evidence, or evidence

tending to undermine the credibility or qualifications of the expert witness. Cf. Firemen's Mutual Ins. Co. v. Aponaug Mfg. Co., 149 F. 2d 359, 363 (5th Cir. 1945). We are dealing solely with the sufficiency of supporting evidence which has not been contradicted. Nor does our holding involve the propriety of summary judgment on the basis of expert testimony in general. We are not confronted with expert testimony which is equivocal or internally inconsistent, or which bears on issues as to which, by their nature, the trier of fact would be entitled to substitute its own practical judgment for the opinion of experts, even though the expert testimony be uncontradicted.[4] We hold only that, in the absence of opposing evidence, the unequivocal testimony offered in support of the motion in this case supported the District Court's conclusion that there was no genuine issue of material fact to be resolved.

Since the motion was sufficiently supported, it was incumbent upon appellant to present some evidence contradicting or undermining that of the moving party. This he did not do. No showing was made that, due to the unavailability of opposing

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[4] E.G., Sartor v. Arkansas Nat. Gas Corp., supra; Head v. Hargrave, supra; Seaboard Surety Co. v. First Nat'l Bank, 263 F. 2d 868, 871 (5th Cir. 1959); Stafos v. Mo. Pac. Ry. Co., 367 F. 2d 314, 317 (10th cir. 1966); Rhoades v. United Airlines, Inc., 340 F. 2d 481, 485 (3d Cir. 1965).

evidence, relief might be called for under Rule 56 (f). Some six months elapsed between service of the original motion for summary judgment and the District Court's order, and three months between the date of the deposition and the order, during which period appellant was fully apprised of the tenor of defendants' motion. Thus, while appellant contends that the record is lacking in testimony by Winn as to his past medical history, and particularly whether he was ever treated for tuberculosis -- matters which appellant contends might have rendered Dr. Ziskind's opinion open to question -- this deficiency was appellant's to rectify. And while appellant obliquely contends that summary judgment is improper because of his inability to secure his own medical examination of Winn, who was not a party, the disability imposed by Rule 35 (a) would have endured even had the case gone to trial. Such a disability does not relieve the party opposing summary judgment of the burden of showing that there exist issues of fact which require resolution at a full evidentiary hearing. See Radio City Music Hall Corp. v. United States, supra, at 718.

Appellant's final contention is that summary judgment deprives him of a right to trial by jury. This contention is without merit. See Port of Palm Beach Dist. v. Goethals, 104 F. 2d 706, 709-10 (5th Cir. 1939).

AFFIRMED.

UNITED STATES COURT OF APPEALS
Fifth Circuit

Office of the Clerk
Edward W. Wadsworth
Clerk
Room 408-400 Royal St.
New Orleans, La. 70130
(504) 527-6514

December 15, 1970

TO ALL PARTIES LISTED BELOW

Re: No. 30188 - Webster vs. Offshore Food Service, Inc., et al

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Gentleman:

You are hereby advised that the Court has today entered an order denying the Petition ( ) for Rehearing in the above case. No opinion was rendered in connection therewith. See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

By /s/ Frances Wolff
Deputy Clerk

cc:
Mr. Charles R. Maloney
Mr. Thomas M. Breen
Messrs. George V. Baus
Harold A. Thomas

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-107

No. 1525

CHARLIE M. WEBSTER,
Plaintiff-Appellant,

versus

OFFSHORE FOOD SERVICE, INC., ET AL,
Defendants-Appellees.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ADAMS AND REESE
HENRY B. ALSOBROOK, JR.
847 National Bank of Commerce Bldg.
New Orleans, Louisiana 70112

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It is undisputed fact that Charlie Webster was employed aboard the Marlin Drilling Tender No. 3 between the dates of February 17, 1968 and August 3, 1968. His normal work period on the tender was seven days, followed by seven days off. It is unknown what Mr. Webster did on his time off.

At all times when Charlie Webster was living aboard the tender, his roommate was Mr. Arthur Winn. Mr. Arthur Winn has never had an active case of tuberculosis during his lifetime, and, on May 2, 1969, a medical examination indicated that no inflammatory disease such as tuberculosis could be found in Mr. Winn. It has been judicially noticed that tuberculosis is a contagious disease. A new infection can be contracted only by the passage of Tubercle Bacilli from one who has had an open or active case of tuberculosis to one who has never been previously affected by such a microbe.

QUESTIONS PRESENTED

Did the lower court err in granting summary judgment to the defendants when the only evidence presented was Mr. Webster's admission that the only unseaworthy condition aboard the vessel was the presence of spittle in an open can and the testimony of Dr. Morton Ziskind that such a condition could in no way be the cause of Mr. Webster's disease of tuberculosis?

REASONS FOR DENYING THE PETITION

1) The District Court was correct in accepting the affidavit of Dr. Morton Ziskind as evidence of material fact.

2) The District Court was correct in granting defendant's motion for summary judgment because there was no contested issue of material fact present.

3) The mere filing of a suit does not entitle a litigant to a trial by jury. There must be an issue of material fact present for the jury to try.

4) At no time did plaintiff produce any material facts to controvert the evidence presented by defendant, and under the facts presented, defendants were entitled to a summary judgment as a matter of law.

ARGUMENT

In their motion for summary judgment, defendants have presented three sworn statements to support their position. The first is the deposition of Charlie Webster in which he testified that he did not know of any condition aboard the Marlin Drilling Tender No. 3 which constituted an unsanitary or unseaworthy condition other than the open can into which Mr. Winn expectorated. In his answers to interrogatories, Mr. Webster again stated that the specific condition which allegedly caused the vessel to be unseaworthy was the open can of spittle. Finally, the defendants presented

the affidavit of Dr. Morton Ziskind which contained the following medical facts:

(1) Mr. Arthur Winn has never had an active case of tuberculosis during his lifetime, and on May 2, 1969, a medical examination indicated that no inflammatory disease such as tuberculosis could be found in Mr. Winn.

(2) Tuberculosis is a contagious disease and a new infection can be contracted only by the passage of Tubercle Bacilli from one who has an open case of tuberculosis to one who has never been previously affected by such a microbe.

(3) Any roommate, companion, or relative of Mr. Winn, who contracted tuberculosis, cannot attribute the cause of the disease to his physical proximity to Mr. Winn, who shows no signs of active pulmonary tuberculosis.

Plaintiff relies heavily on the case of *Sentilles vs. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 4 L.Ed. 2d 142, 80 S.Ct. 173. The case is clearly distinguishable. In brief, the facts of the case are as follows. While aboard ship, the plaintiff suffered a trauma which the jury found had aggravated a pre-existing tubercular condition. There was medical testimony to the effect that it was possible that the trauma caused an aggravation of the pre-existing tubercular condition. In reversing the 5th Circuit, and upholding the verdict of the jury, the Supreme Court found that there was support for the finding that trauma caused an ag-

gravation of tuberculosis, and the scope of judicial review was the reasonableness of that finding. Here the plaintiff suffered no accident or trauma while employed. At the time the motion for summary judgment was heard the only moving event used as a basis for plaintiffs' lawsuit was his connection with Mr. Winn.

In the present case, there is only the uncontradicted affidavit of Dr. Morton Ziskind, as well as his sworn deposition, that Mr. Winn could not have been the cause of Mr. Webster's contracting tuberculosis. There is also the statement of the plaintiff that the only unseaworthy condition of the vessel was the open can of spittle. Thus, as can clearly be seen from the above statements, the unseaworthy condition of the vessel as alleged by plaintiff could not have been the cause of his tuberculosis. The cause is unknown, and it is obvious that plaintiff cannot prove the cause.

When the motion for summary judgment along with supporting affidavits was presented to the Court by defendants, plaintiff produced no countervailing affidavits. If the matter was appropriate for summary judgment, and defendants contend that it was, the Federal Rules direct the Court to enter summary judgment in favor of the moving party.

> ". . . When a motion for summary judgment is made and supported as provided by this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as other-

> wise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment if appropriate, shall be entered against him." Rule 56 (e). Federal Rules of Civil Procedure.

In the case of *Miller vs. Western Board of Adjusters, Inc.*, 427 F.2d 175 (9th Cir. 1970), the Court had an opportunity to discuss the above rule. Quoting from the case of *Lundeen vs. Cordner*, 356 F.2d 169 (8th Cir. 1966), the Court stated at page 176:

> "The law is equally clear that when a moving party presents an adequately supported motion for summary judgment (as was done herein) the adverse party must come forward with facts, not allegations, which controvert the necessary facts set forth in the moving party's case, Rule 56 (e) clearly spells out this duty on the sanction of suffering a summary judgment. (emphasis added)."

It must be noted that plaintiff has presented a long discussion of the rule in *Sentilles vs. Inter-Caribbean Corp.*, supra. As noted above, the case was decided by a jury when evidence was presented concerning the possibilities and probabilities of trauma causing a reactivation of latent tuberculosis. The Supreme Court held that if the verdict was reasonable, the reviewing court should not interpose its will in place of the jury's, simply because the court feels that its views are more reasonable.

The facts in the present case are quite different. Evidence in the form of sworn statements was presented which proved beyond doubt that plaintiff's tuberculosis could not have been caused as alleged. Instead of filing countervailing affidavits, plaintiff simply argued that he contracted tuberculosis during a certain period of time, and that tuberculosis could be possibly transmitted through the ventilation system of the vessel. Nowhere is any evidence presented as to what or who caused the plaintiff's tuberculosis.

Since the plaintiff did not come forward with countervailing affidavits, it must be assumed that there simply was no evidence to refute the position taken by the defendants.

A summary judgment does not have to preclude every possibility of how an incident happened. All that is required is that there be no genuine issue of material fact present. In the case of *U. S. vs. Device Labeled "Cameron Spitler, etc."*, 261 F. Supp. 243 (1966), the court stated at page 245:

> "Not every issue of fact, however genuine, precludes the entry of summary judgment. It is only genuine issues of material facts that have that effect."

It may also be noted that to be a genuine issue, the issue must be substantial. In the case of *Taylor vs. Rederi A/S Volo*, 249 F. Supp. 326 (1966), the court stated at page 328:

> "A 'genuine issue' is one that can be supported by substantial evidence. The whole purpose of summary judgment would be defeated if a case could be forced to trial by a mere assertion that a material issue is present without any showing of proof. Summary judgment is therefore a test to determine if there is evidence for a trial."

Furthermore, in the case of First Nat. Bank vs. Cities Service Co., 391 U.S. 253, 20 L.Ed. 2d 569, 88 Sup. Ct. 1575, this Honorable Court held:

> "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." 391 U.S. 290.

There is no reason that a different rule should be used in the present case.

It is submitted that the district court did not err in finding that there was no issue of material fact. Plaintiff had an opportunity to present evidence to show the existence of the genuine issue of material fact at the time of summary judgment; this he did not do. Thus, the district court committed no error in granting a summary judgment based on the plaintiff's own

admissions concerning the seaworthiness of the vessel and the statements of medical fact contained in the affidavit of Dr. Morton Ziskind.

In summary, plaintiff has argued that he is entitled to a trial by jury because of the following allegations:

(1) That Charlie Webster was allegedly free from evidence of tuberculosis on December 27, 1967, and had positive findings of tuberculosis on August 13, 1968.

(2) That Arthur Winn or someone aboard the Marlin Tender No. 3 caused him to contract tuberculosis.

Defendants have proved beyond a doubt that Arthur Winn had no connection with the plaintiff's contracting tuberculosis. The plaintiff has presented no evidence to show that anyone else on the vessel had an active case of tuberculosis or caused the plaintiff to contract tuberculosis. So what remains is the allegation that plaintiff did not have tuberculosis in December, 1967 and was positive for the disease in August, 1968. This is certainly not evidence which would merit a trial of the case. A summary judgment may be used to test the evidence of an opposing party in order to determine the necessity of a trial. In the present case, plaintiff has shown no evidence of any genuine issue of material fact. Defendants call this Court's attention to the reasons for judgment of the lower court:

"At the time of the hearing plaintiff had produced no countervailing evidence but requested that he be allowed to depose Dr. Ziskind, which request was granted. Plaintiff now contends that the motion should be denied based upon Dr. Ziskind's deposition. We disagree. In his deposition, Dr. Ziskind never changed his position as stated in his affidavit. He still concludes that the plaintiff's tuberculosis was not contracted because of his physical proximity to Mr. Winn, who (on May 2, 1969) showed no signs of active pulmonary tuberculosis. (See deposition of Morton M. Ziskind, M.D.).

The court finds that there is no genuine issue as to any material fact in this case, and the movers are entitled to a judgment as a matter of law."

CONCLUSION

For the foregoing reasons, this petition for certiorari should be denied and the decision of the District Court and the affirmance by the Fifth Circuit Court of Appeal is correct on the basis that defendants are entitled to summary judgment as a matter of law. The application for writs should also be denied.

All of which is

Respectfully submitted,

ADAMS AND REESE

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New Orleans, Louisiana 70112
Attorney for Appellee

Of Counsel:
ADAMS AND REESE
New Orleans, Louisiana

CERTIFICATE

I, the undersigned member of the Bar of this Honorable Court, do hereby certify that copies of the above and foregoing Brief in opposition to the Petition for Certiorari have been served upon appellant, Charlie M. Webster, by depositing the same, postage prepaid, in the United States mail, addressed to Charles R. Maloney, 822 Richards Building, New Orleans, Louisiana 70112.

New Orleans, Louisiana, this ____ day of June, 1971.

HENRY B. ALSOBROOK, JR.